IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 26.

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT.

SIDNEY S. ALDERMAN,
RUSSELL M. ROBINSON,
Attorneys for Respondent.

S. R. PRINCE,
H. G. HEDRICK,
W. T. JOYNER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES CITED.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 26.

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT.

OPINION BELOW.

The opinion of the Supreme Court of North Carolina is reported in 222 N. C. 367.

STATEMENT OF CASE.

This is a suit by petitioner, begun in the Superior Court of Guilford County, North Carolina, on July 26, 1939 (R. 1), to recover damages for the death of her intestate, Earle A. Brady, on December 25, 1938 (R. 2). The suit was brought under the Federal Employers' Liability Act. Issues of negligence, assumption of risk, contributory negli-

gence and damages were submitted to a jury, after motion for nonsuit by respondent was overruled. All the issues were answered for petitioner, resulting in a judgment for $20,000.00.

On appeal the unanimous decision of the Supreme Court of the State of North Carolina was (1) that there was no evidence of negligence on the part of respondent and (2) that Brady, a brakeman, caused his death solely and proximately by reason of his negligence in setting a derailer on the rail of a storage track, at Hurt, Virginia, and then signalling the engineer to back against it with a cut of four cars, on which Brady was riding at the time they struck the derailer.

Statement of Facts.

The facts stated in petitioner's brief are insufficient for a proper understanding of the factual situation in this case. In several instances we contend that there are inaccuracies, and that many material facts have been omitted. Therefore, we deem it necessary to set forth a statement of the facts.

At the time of the death of plaintiff's intestate he was engaged in the performance of his duties as brakeman on a freight train, consisting of an engine and 37 cars, running from Spencer, North Carolina, to Monroe, Virginia. The train arrived at Hurt, Virginia, between those two points, at 5:50 A. M., and the accident occurred about 6:30 A. M. It was still dark and the deceased had a lantern with which he was giving signals to the engineer for the movement of the train.

Plaintiff's intestate was an experienced railroad man. The petitioner testified that he had been a brakeman on the railroad since 1922 and that during that time he had frequently made runs as brakeman from Spencer, North Carolina, to Monroe, Virginia, and back on both freight and passenger trains (R. 15). Hurt, Virginia, has a connection with the Virginian Railway on which connection the respondent

receives heavy deliveries of coal and northbound trains go into this storage track practically every day to pull connections and to place northbound coal thereon (R. 56 and 80). This uncontradicted testimony leads us to differ with the statement of counsel for petitioner that: "There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia." (Petitioner's brief p. 4.)

At the time of his death he was riding the lead end of a gondola freight car which was one of a cut of four cars being backed into the storage track. He was in charge of that movement and was giving signals by lantern to the engineer to proceed. While he was so engaged, the car upon which he was riding ran over the "wrong end" of a derailer in derailing position on said storage track. The car was derailed and Brady was thrown from it to the track and was run over and killed.

The nature and purpose of a derailer.

Derailers are in common use on all railroads. They are used on storage tracks (R. 20 and 44). Brady was thoroughly familiar with them. They are used on storage tracks where cars are parked or left without attending railroad employees. Where there is such a track, which has some downgrade sufficient to cause a loose car to roll down and into the switch and foul the main line, a derailer is put near the downgrade outlet switch of that track. Its sole purpose is to derail cars to prevent them from rolling out of the sidetrack onto the main line.

That being the purpose of a derailer, it is designed and shaped to carry out that purpose. (Defendant's Exhibit No. 1, R. 46 and 136, and Exhibit No. 2, R. 46 and 137.) Its placement is controlled by a rod leading to a handle, or lever, rather similar to a switch handle or lever. By the use of that handle or lever the derailer may be moved away from the rail so that cars may run over the rail freely. By another movement of the handle it may be put back on the rail so that it will derail cars (R. 75).

It is a large, heavy piece of iron weighing from 50 to 75 pounds, designed to rest on top of the rail. It is always placed on the outer rail of the storage track, or the rail away from the main line. It is placed near the switch outlet. The end of the derailer farthest from the switch and pointing toward the stretch of storage track on which cars will be parked is tapered. That tapered end fits quite closely to the rail and is but little above the rail. It then gradually rises to a height of about three or four inches (R. 34). As it rises from its tapered end there is a groove and a ridge leading from the inside of the rail and the inside of the derailer across the derailer and toward the outside. This is so designed that it will catch the flange of each outer wheel of the approaching cars and will carry those flanges over the outer rail so that the wheel will drop outside of that rail. The flange of the corresponding wheel at the other end of the axle is against the inner part of the opposite rail and as that wheel is pulled away from the rail it drops between the rails. Thus, the derailer is designed to derail drifting cars away from the main line so that certainly they will leave the rail before getting to the main line and certainly they will leave the rail and get on the ground away from the main line as an insurance against the dangerous fouling of the main line.

The other end of the derailer, the end nearest the switch, and frequently spoken of by the witnesses as the "wrong end" of the derailer, has no particular function or design. It is merely the end off which the derailed wheel drops. It is not tapered, but blunt, and rises quite abruptly to a height of about three or four inches (R. 34, Defendant's Exhibit No. 2, R. 46 and 137). It is not designed either to derail or to hold on the rails cars approaching from the main line. If wheels coming to this "wrong end" hit this heavy fixed obstruction they will jump and where they will land, no one can tell. Cars approaching from the main line are not supposed to run over a derailer (R. 34 and 45). The evidence on this was unanimous and uncontradicted.

J. Russell Holden and J. D. Heritage, witnesses for the plaintiff, stated that they had had many years experience as brakemen and that they had never signalled for cars to run over a derailer from the wrong end. They said that they realized the danger that would be involved in doing so and that it was the general custom to leave the derailer off until the switching operation was completed. They said that you were not supposed to run trains of any kind over derailers, either way, and that it certainly would be careless to signal the movement of a train to come over on the derailer if you know it is set on the rail and that the use that the rail is supposed to be put to is for the wheels of the train and cars to run over those rails with the derailer off, and that it is a safety device altogether (R. 34 and 45).

The track lay-out and the physical situation.

The accident occurred at Hurt, Virginia, somewhat south of the station, as shown by defendant's Exhibit No. 6 (R. 47 and 141). At this point there were four tracks. On the west there was first a track known as a house track. Next there was the southbound main line. Next there was the northbound main line. Next there was a storage track on which the accident occurred (R. 19 and 22).

At the north end of the storage track there was a switch, which was somewhat south of the Hurt station. About four car-lengths south of the switch and on the outer or eastern rail of the storage track was a derailer. There was no light on the derailer stand although there were prongs upon which a light could be placed. According to the uncontradicted testimony there are customarily and regularly no lights on derailers in an automatic block system such as the defendant had at the place in question. None of the witnesses, except Paul Shields, testified that they had ever seen a light on a derailer in an automatic block system and they testified that derailers are only used on storage tracks (R. 20, 50, 53, 54, and 75, 76). Paul Shields' testimony in this regard was confined to this particular derailer and to an

assertion that he had seen a light on this derailer *subsequent* to the fatal injury to Brady (R. 21-24).

On the storage track more than 37 car-lengths south of the derailer there were 12 cars parked (R. 17, 18). These cars were to be picked up by the train upon which Brady was brakeman. South of the derailer, between the derailer and the north end of the 12 parked cars, a public road crossed all of the tracks of the defendant at about right angles. This road crossing was about one-eighth of a mile south of the derailer (R. 22, 23).

The storage track was installed in 1936 and the rails were taken from a section of the main line. The uncontradicted testimony was to the effect that it was a "practice of the Southern Railway Company and every other railroad to use relay rails, which means to take rails out of the main line and use them in sidings and industrial tracks" (R. 57). It appears from the testimony of witness M. V. Drinkard that the rails have not been changed and that they are the same rails today that were installed in 1936 (R. 50). The rail opposite the derailer bore a date mark of 1912.

The uncontradicted evidence is that the heaviest engines, weighing 350,000 pounds, have been in and out of this storage track practically every day with a large number of freight cars from 1936 until the time of trial in 1942, and that there has been no change or repair of the rails, cross-ties, derailer or any other part of the track since the accident on December 25, 1938 (R. 51, 56 and 80).

The track at the point in question was gauged on the afternoon before the accident and immediately following the accident, and the track gauge showed both times that the track gauged the exact required or standard gauge width of four feet eight and one-half inches (R. 50, 51 and 77).

The movements of the train.

The train in question was a Southern Railway Freight Train from Spencer, North Carolina, to Monroe, Virginia. It had an engine, 37 cars and a caboose. It arrived at Hurt,

Virginia, about 5:50 A. M., on December 25, 1938. The accident occurred between 6:20 and 6:30 A. M., on said day. At the time of the accident and at all times prior thereto it was dark and signals were given by lantern. When the freight train pulled into Hurt it had orders to go on the storage track to let northbound passenger train No. 30 pass and then pick up the 12 empty cars. Those cars were destined for Lynchburg, Virginia. The freight train had four empty cars also destined for Lynchburg, Virginia, which were attached at the front end of the train next to the engine. Therefore, the proposed movement was to let No. 30 pass and then switch the 12 cars from the pass (storage) track into the freight train between the four cars destined for Lynchburg and the remainder of the train. This proposed movement was explained to the train crew by the conductor (R. 62).

Between the north end of the 12 parked cars and the derailer there was sufficient room to place the whole freight train of 37 cars (R. 62).

As its first movement the freight train, which had pulled up on the main line north of the switch, backed into the storage track. After some wait, No. 30 passed going north.

As its second movement, the freight train pulled out of the storage track and on the main line north of the switch.

As its third movement, the freight train backed on the main line to a point where the engine was south of the switch leading into the storage track. On this movement the engine backed far enough south to clear the public road, above mentioned, which crossed the tracks about one eighth of a mile south of the derailer. The train stopped there. The coupling between the fourth car back of the engine and the remainder of the train was uncoupled by Brady (R. 18, 21 and 63).

As its fourth movement, the engine and four cars headed north and pulled up so that the rear end of the fourth car was north of the switch leading into the storage track.

As its fifth movement, the engine and four cars backed into the storage track. Brady was riding on the lead end of the first of these four cars, the southeastern corner of that car, or the corner on the side of the engineer and on the side of the switch stand and on the side of the derailer and the derailer stand. Brady had a lantern and had signalled the engineer with it to come back into the storage track with the cut of four cars (R. 18).

At this time the derailer was on the rail or set to derail cars which might roll out of the track. When the lead end of the car on which Brady was riding struck the wrong end of the derailer it was moving about three or four miles an hour. The uncontradicted testimony shows that the four cars derailed, the leading truck on each car as it backed into the siding having derailed. The front truck on the car on the south end, that is the lead end, had derailed to the west. The leading or front truck on the second car had derailed to the east. The leading or front truck on the third car had derailed to the west. The leading or front truck on the car next to the engine had derailed to the east. None of the trucks of the four cars except the front trucks of each of them derailed or came off the track (R. 19, 51 and 70).

The positions and movements of the personnel.

The freight train in question was manned by five men: the engineer, Woodson; the fireman, Dorsett; the brakeman, Brady; the flagman, Scruggs; and the conductor, Brandt. There was nobody else in the crew (R. 17).

The Conductor: Just before the first movement of the freight train from the northbound main line track into the storage track, the conductor opened the switch leading into the storage track and removed the derailer from the outside rail of the storage track. Then the conductor went back about one-eighth of a mile to protect the highway crossing and remained there until the train came out of the storage track and backed down the main track again on its third

movement. On that third movement the conductor rode the caboose from the highway crossing down to the end of that movement and then went across to the storage track, south of the highway crossing, to inspect the 12 cars which his train was going to pick up. He continued that inspection and remained at those 12 cars, some 75 car-lengths south of the derailer, until after the accident. Upon signal from the engineer immediately following the accident he came forward from those 12 cars to the scene of the accident (R. 19, 62, 63, 64, 83, 85, 86).

The Flagman: The flagman, E. C. Scruggs, stayed in the caboose until after No. 30 passed. He then went back to flag anything that might approach from the south and to take the brakes off of the 12 cars which were to be picked up. He did not touch either the switch or the derailer and he got off the caboose while the train was in the storage track and went south to flag and to take off brakes (R. 19, 83, 84, 85, 86). He was so engaged at all times until the time of the accident. After the accident and upon signal from the engineer, he went forward or north from the 12 cars to the scene of the accident (R. 19, 85, 86).

The Fireman: The fireman, A. L. Dorsett, at all times during the several movements of the train was on his seat box on the left-hand side of the cab, on the western side of the engine. He was on the side away from the storage track, the switch and the derailer. He was on the side away from Brady who was giving signals to the engineer to enter or leave the storage track (R. 18 and 83).

The Engineer: The engineer, L. O. Woodson, at all times during the several movements of the train was on his seat box in the cab of the engine on the right side, the eastern side of the engine. He was on the same side of the storage track as were the switch, the derailer and Brady, who was giving signals to enter or leave the storage track (R. 17 and 83).

The Brakeman: Earle A. Brady, plaintiff's intestate, was the brakeman. After the train had moved into the storage track to await the passing of No. 30, Brady closed the switch and also put the derailer back on the rail (R. 21). After No. 30 passed Brady removed the derailer from the rail and opened the switch and signalled the engineer to come back out on the main line (R. 21). After the train had moved out on the main line as its second movement and back down the main line and passed the highway crossing as its third movement Brady uncoupled the coupling between the fourth and fifth cars back of the engine. Brady was on these four cars and the engineer saw him get off of them at the time that he uncoupled them from the rest of the train south of the crossing (R. 21). Brady rode back north on these four cars until he got north of the switch. He got off the car, threw the switch then got back on and signalled the engineer. The plaintiff's witness, L. O. Woodson, testified to the foregoing without any contradiction and also testified that "from the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. 21).

Brady caught the lead end of the fourth car and when it passed over the derailer he was thrown off and killed. Those movements of Brady are unquestioned. Although there is no direct evidence from any person who actually saw Brady close the switch to permit the train to back up on the main line as its third movement (and this is the time when he must have put the derailer back on the rail), the location of every other member of the train crew was accounted for as above set out. The inevitable conclusion is that Brady put the derailer on the rail after the train had come out of the storage track and failed to take it off the rail before he signalled the engineer to come back into the storage track from the main line with the four cars. The plaintiff offered no evidence tending to show that any person other than Mr. Brady touched, or was anywhere near, the switch or the derailer, after the conductor first opened

the switch and removed the derailer to let the freight train into the storage track for No. 30 to pass.

The plaintiff put on two former railroad brakeman, J. Russell Holden and J. D. Heritage, who had each been brakeman for the Southern Railway Company for about ten years and who testified that they were thoroughly familiar with sidings, storage tracks and derailers, yet neither of them testified that there was any custom or practice to use lights on derailers and neither of them testified that they had ever seen a light on a derailer.

There was no evidence as to any custom or practice to use lights on derailers, but on the contrary the uncontradicted evidence was, as above stated, that derailers are only used on storage tracks and that in automatic block systems lights are not used on either derailers or switches and that the accident happened in an automatic block system. Respondent's Rule Book shows a place for a light on a derailer but the uncontradicted testimony was that this only applies on a signal track where there are no automatic signals, and not to a derailer in an automatic block system such as existed at Hurt, Virginia (R. 53).

Evidence as to condition of the track.

There was evidence that the rail opposite that on which the derailer was located had "flowed." That is, that it was worn and that slivers of iron had been picked off of both sides of the rail. There was evidence that the ballast was not flush with the top of the ties and that the ties sloped somewhat to the west or away from the derailer.

Almost all of the plaintiff's evidence was directed towards the condition of the rail opposite the derailer. Plaintiff put on two so-called experts, J. Russell Holden and J. D. Heritage, who testified, in answer to hypothetical questions, that if the jury should find the condition of the rail opposite the derailer and the roadbed to be as described by the witnesses it was their opinion that such condition caused the derailment, rather than the wheels of the cars striking the wrong end of the derailer.

There was no evidence that any of the rails, the derailer, or the roadbed were in any way deficient, defective or dangerous with respect to normal operations over the storage track at slow speed; that is, the movement in and out of the storage track of slowly moving equipment. There was no evidence that the running of a car over the so-called "wrong end" of the derailer was either normal or foreseeable. One of the plaintiff's so-called experts, J. Russell Holden, testified: "The use that the rail is supposed to be put to is for the wheels of the train and cars to run over hose rails with the derailer off. It is a safety device altogether." (R. 34).

The pictures of the rails, the derailer and the roadbed (Defendant's Exhibits Nos. 1 to 7, R. 45, 46, 47-136, 137, 138, 139, 140, 141, 142) and the uncontradicted evidence of continuous use of this storage track since 1936 by heavy freight trains both before and since the accident, without any repair or alteration thereof after the accident, demonstrate that the rails, the derailer and the roadbed were in no way deficient, defective or dangerous with respect to normal operations over such storage track or that there was any foreseeable risk or danger in respect thereto.

The plaintiff offered no evidence to support its allegation that the defendant was negligent in failing to properly inspect said storage track, derailer and instrumentalities in connection therewith. On the contrary, the uncontradicted evidence on the part of the defendant was to the effect that there was proper and careful inspection of the track, rails, derailer and other instrumentalities in connection therewith, the last inspection before the accident being on the afternoon before the accident occurred (R. 49 and 76, 77).

SUMMARY OF ARGUMENT.

I.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF RESPONDENT.

II.

THE PETITIONER'S INTESTATE MET HIS DEATH SOLELY BY REASON OF HIS OWN NEGLIGENCE.

III.

NO QUESTION AS TO THE EFFECT OF THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT UPON ASSUMPTION OF RISK HAS BEEN RAISED BY PETITIONER IN A TIMELY AND ADEQUATE MANNER AND THE DECISION OF THE LOWER COURT WAS NOT BASED UPON ASSUMPTION OF RISK, BUT UPON OTHER DISTINCT GROUNDS ENTIRELY ADEQUATE TO SUPPORT IT.

IV.

THE AMENDMENT OF 1939 TO THE FEDERAL EMPLOYERS' LIABILITY ACT IS NOT RETROACTIVE AND THEREFORE DOES NOT APPLY TO THIS CASE.

V.

SINCE THE AMENDMENT OF 1939 DOES NOT APPLY TO THIS CASE THE DECISION OF THE COURT BELOW CAN ALSO BE ADEQUATELY SUPPORTED ON THE BASIS OF ASSUMPTION OF RISK BY PETITIONER'S INTESTATE.

ARGUMENT.

I.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF RESPONDENT.

Petitioner's contentions in respect to respondent's alleged negligence are based on speculation and conjecture conclusively refuted by the evidence, from which evidence no inferences can be drawn different from those of the court below. The argument for petitioner "dwells too hard on conjecture." *Chicago Great Western R. Co.* v. *Rambo*, 298 U. S. 99, 102. Counsel for petitioner look everywhere for the cause of the death of her intestate except where it obviously lies, the act of petitioner's intestate in placing the derailer on the rail, or his failure to remove it therefrom, before signalling the engineer to back the locomotive and four cars into the passing track.

The Federal Employers' Liability Act does not undertake to define negligence, either before or since the Amendment of 1939. And what is negligence thereunder is a matter to be determined by the application of the principles of the common law, as interpreted and applied by this Court. *Southern Railway Co.* v. *Gray*, 241 U. S. 333; *Tiller* v. *Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 451, in which latter case the court says: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." A reading of the opinion of the court below clearly shows that it is not in conflict with the decisions of this Court as to the legal concept of negligence. No such conflict has been pointed out by petitioner. On the contrary, it appears from the opinion of the court below that it relied upon and applied the same rule of law in respect to what constitutes ac-

tionable negligence as that announced by this Court, the opinion citing and quoting from *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

In cases of this character it is for this Court to examine the record to determine whether, as a matter of law, there is enough evidence to sustain a finding of negligence. *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U. S. 458; *Chicago Great Western R. Co. v. Rambo, supra.* The federal rule and not the scintilla rule, applies in a suit in a state court under the Federal Employers' Liability Act. *Western & A. R. Co. v. Hughes*, 278 U. S. 496; *Penn. R. Co. v. Chamberlain*, 288 U. S. 333. Under this rule submission of an issue of fact to a jury is not required if there is only a scintilla of evidence, and it is the duty of the judge to direct the verdict when the testimony is such that a jury cannot properly proceed to find a verdict for the party producing it. *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787; *Galloway v. United States*, 63 S. Ct. 1077, 1086.

A party claiming under the Act must in some adequate way establish negligence and causal connection between this and the injury, and conjecture is not sufficient. *Patton v. Texas & P. R. Co.*, 179 U. S. 658; *New York Cent. R. Co. v. Ambrose*, 280 U. S. 486; *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351; *Northwestern Pac. R. Co. v. Bobo*, 290 U. S. 499.

The decision below was entirely in accord with the uniform holdings of this Court that unsubstantial evidence, sufficient only to raise a speculation or surmise on an issue of negligence, cannot support a verdict. Indeed, in the instant case the speculation and conjecture on which petitioner relies is repelled by the physical facts in evidence.

In *Brennan v. Baltimore & O. R. Co.*, 115 Fed. (2d) 555, certiorari denied, 312 U. S. 685, in an action for injuries sustained by a brakeman when the car on which he was riding was derailed, evidence of negligence of the railroad as a cause of derailment was held insufficient for the jury.

in view of physical circumstances which refuted the plaintiff's testimony that he had properly performed his duty to throw the derail lever and move the derail block off the rail before giving the engineer the signal to back the car on the sidetrack on which the derailer was located. The Court also held in that case that, in order to recover, a railroad employee must produce substantial evidence of negligence and cannot base his case upon mere speculation.

Two so-called experts, Heritage and Holden, in answer to hypothetical questions, testified for petitioner, that in their opinion the condition of the rail opposite the derailer caused the derailment, rather than the wheels of the four cars striking the blunt or wrong end of the derailer (R. 32, 33, and 39). This was the "gravamen of plaintiff's complaint", (opinion of the court below, R. 128) and this testimony of these two witnesses was all that petitioner offered in support thereof.

Heritage testified (R. 44) that the defective condition of the rail would have to play a part in widening the gauge of the track to accomplish the result he mentioned. Yet the uncontradicted testimony was that the standard width of a track between rails is 4 feet 8½ inches (R. 50) and that the track at the derailer was gauged exactly at that width on the day before the accident (R. 50, 51) and again on the morning after the accident (R. 77).

No witness testified that he had seen a train hit the wrong end of a derailer with a defective or worn rail opposite it. In none of the instances about which Ashby or Holden testified did they say that any of the rails were bad.

The vice in the testimony of Heritage and Holden lies in the fact that they were both guessing or speculating and that the speculation of their opinion evidence was contrary to the undisputed physical facts in evidence. This is not only implicit in their testimony but one of them, Holden, admitted the guesswork in his testimony (R. 34), as follows:

> "Q. If you take and assume that the rails on the particular track are perfectly good rails, absolutely

new, the largest size, the best size and best type, a derailer of the type Mr. Hudgins described to you, on one of those rails, would you be willing to tell this jury that when you back in there under conditions described by him it would go on over every time without derailing?

A. If the cars were not moving over three or four miles an hour, I believe nine times out of ten it would.

Q. Sometimes it would derail it?

A. Possibly.

Q. So, it is just a matter of guesswork, even if the rail is good on both sides, it is just a matter of guesswork or chance as to whether or not there is a derailment—that is a fact?

A. The odds would be against it not moving any faster than that.

Q. It would be a matter of chance?

A. Yes, sir."

Although the other expert, Heritage, testified on a former trial, which resulted in a mistrial, that the condition of the rail opposite the derailer would cause the wheels of cars on that rail to drop inside the rail; or toward the derailer (R. 42), they both testified on this trial that the defective condition of the rail opposite the derailer would cause all of the wheels on all of the trucks on all of the four cars to derail to the west, or away from the derailer (R. 33 and 40). The fact that this testimony was rank speculation, as well as bad guesswork, is shown by the undisputed testimony that the front trucks of the first car derailed to the west, the front trucks of the next car derailed to the east, the front trucks on the third car derailed to the west, the front trucks of the fourth car derailed to the east, and none of the other trucks of any of these four cars left the rails (R. 19, 51 and 70).

Such speculation and conjecture will not support a verdict. *Patton v. Texas & P. R. Co. supra; New York Cent. R. Co. v. Ambrose, supra.*

"If such statements are without foundation in fact, as they are on this record, they must be held to be without probative value as evidence in law. To hold otherwise

would be to surrender to the tyranny of a fetishism on wholly unsubstantial grounds." *Harrison* v. *North Carolina R. Co.*, 194 N. C. 656, 660.

For the foregoing reasons and under the principle announced in *United States* v. *Johnson*, 63 S. Ct. 1233, 1241, and *Galloway* v. *United States*, 63 S. Ct. 1077, 1085, 1090, the respondent contended in the court below (R. 119 and 121), and now contends, in support of the judgment (*Langnes* v. *Green*, 282 U. S. 531), that the testimony of these so-called expert witnesses should not have been given consideration, although the court below, after doing so, arrived at a correct result.

Petitioner's contention that there was no light on the derailer has already been fully met in respondent's statement of facts, showing that derailers on storage tracks in automatic block systems never have lights and that plaintiff offered no evidence to the contrary. No inference of negligence can be drawn from this, *Potter* v. *Atlantic Coast Line R. Co.*, 197 N. C. 17; *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, especially since Brady had a lantern, was thoroughly familiar with the location of the derailer and had operated it twice immediately before he finally set it in the derailing position which caused the derailment and his death. "No one needs notice of what he already knows." *Beaver* v. *China Grove*, 222 N. C. 234.

Paul Shields testified that on one occasion about three years after the derailment he saw a light on the derailer in the daytime and that he never saw it before or since, although he lived an eighth of a mile from it. (R. 23, 24). This chimerical testimony is no evidence of negligence, and in so holding the state court was in accord with federal decisions. *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202; *Dupont de Nemours & Co.* v. *Smith* (C. C. A. 4), 252 Fed. 491.

The petitioner contends that the respondent should have foreseen that cars would be backed against the wrong end of a derailer. The best and most complete answer to this contention will be found in the opinion of the Supreme

Court of North Carolina. We do not discuss the evidence on this point because the contention of petitioner is, at best, that the railroad must anticipate negligence. In other words, the railroad must take precautions against an employee doing the negligent act of running over a derailer from the wrong end. This proposition answers itself.

Petitioner's brief (p. 7) cites *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. ——, 87 L. Ed. (Advance Opinions) 446, 63 S. Ct. 444; *Davis* v. *Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley* v. *New York Central R. Co.* (C. C. A. 2d 1936), 80 F. (2d) 816, cert. den. 297 U. S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young* v. *Wheelock*, 333 Mo. 992, 64 S. W. (2d) 950, cert. den. 291 U. S. 676, 78 L. Ed. 1064, 54 S. Ct. 527; *Bailey* v. *Central Vermont R. Co.* —— U. S. ——, 87 L. Ed. (Advance Opinions) 1030, 63 S. Ct. 1067; *Owens* v. *Union Pacific R. Co.* —— U. S. ——, 87 L. Ed. (Advance Opinions) 1221, 63 S. Ct. 1271; *Seago* v. *New York Central R. Co.*, 315 U. S. 781, 86 L. Ed. 1188, 62 S. Ct. 806; *Lilly* v. *Grand Trunk Western R. Co.*, — U. S. —, 87 L. Ed. (Advance Opinions), 323, 63 S. Ct. 347, for the proposition that the decision below was contrary to the general federal law and to the decisions of this Court.

The *Tiller Case* lays down no new test for determining whether negligence has been shown. In that case it appears that on the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving and the Circuit Court found (128 Fed. 420,

422) that it was "probable that Tiller did not hear cars approaching" from behind him. No special signal of warning was given.

In *Cooley* v. *N. Y. Central R. Co. supra*, it was held that the death of a brakeman resulting from derailment of a car by striking a derail switch could be found by the jury to have been solely and proximately caused by the negligence of another brakeman, O'Neil, in charge of the switching movement, in directing the movement against a closed switch clearly visible to him. If this had been a suit by O'Neil for injuries caused by the derailment it is manifest from the reasoning of the court that it would have directed a verdict against him on the ground that, as in the instant case, the derailment was solely and proximately caused by his own negligence.

In both *Davis* v. *Wolfe*, *supra*, and the *Lilly Case*, there was ample uncontradicted evidence of violation of the Safety Appliance Act, which was, of course, sufficient without further proof of negligence.

Young v. *Wheelock*, *supra*, was an action under the Federal Employers' Liability Act for the death of a fireman, when a train derailed in going downhill around a curve. Plaintiff offered evidence that the track at the point of derailment had between 75 and 100 rotten ties; that in many places the spikes were entirely gone, and in many other places the head of the spike was loose, being an inch or more above the plate; also that there were broken tie plates; that stepping on one end of a tie with one foot would cause the other end to strike the rail; that in going downhill around a curve with the track in this condition the train was traveling 60 miles per hour, or more. In short, this was a case of derailment of a train traveling at a high speed downhill, around a curve, upon what was just short of being no track at all.

In the *Bailey Case* the Supreme Court of Vermont reversed a judgment for the plaintiff, by a divided vote, thus

indicating, as this Court held, that it was a close or doubtful case where fair-minded men might reach different conclusions. In the present case the decision of the Supreme Court of North Carolina was unanimous after a careful and painstaking review of the evidence.

In the *Bailey Case* there was positive evidence of negligence of the defendant in failing to furnish a safe place to work, sufficient to carry the case to the jury in respect to negligence and proximate cause, without indulging in conjecture or speculation.

"Bailey certainly was unskilled and perhaps unfamiliar in the opening of hopper cars." On the contrary Brady was an experienced brakeman, having served as such for 22 years, frequently over the very run on which he was killed.

The hopper car and equipment in the *Bailey Case* were being handled by Bailey in the very manner intended by the defendant, under dangerous conditions arising from its negligence and not through any negligence on the part of Bailey, whereas in the present case the track and equipment of the defendant were safe and adequate for normal and expected use, but were being put to an unusual, extraordinary, negligent and unforeseeable use through the sole negligence of Brady in closing the derailer and then signalling the cut of cars against it.

In the *Owens Case* this Court held that where the evidence is such that the jury may find from the facts either assumption of risk by the employee, or merely contributory negligence on his part, it should be left to the jury to determine the matter. Nothing is said in that case to support plaintiff's contention that a jury should say whether her intestate caused his death by his own act when the evidence permits no other inference. Plaintiff seeks comfort from the Owens case on the unfounded contention that Brady's conduct constituted, at most, "negative negligence," upon the assumption that he did not set the derailer, but here again the undisputed facts repel this assumption, for they

show conclusively that Brady was the only person who could have set the derailer on the rail and that his conduct in setting the derailer and then causing the cut of cars to back against it was positive negligence, which was the sole cause of his death. This defeats recovery upon a ground clearly and distinctly separate from any element of assumption of risk or contributory negligence, with which the *Owens Case* dealt. And for the same reason no question of the "primary duty rule" is open for debate. *Seago* v. *New York Central R. Co. supra,* reverses a judgment on the ground that there was sufficient evidence of negligence for submission to the jury. No facts are stated and no cases are cited in the per curiam opinion in that case.

Each of these cases was governed by its facts and none of them is controlling here or in conflict with the holding below.

II.

THE PETITIONER'S INTESTATE MET HIS DEATH SOLELY BY REASON OF HIS OWN NEGLIGENCE.

We deem it unnecessary to burden the Court with a repetition of the evidence upon which the lower court was quite right in holding that the petitioner's evidence points unerringly to the conclusion that the negligence of her intestate was the sole proximate cause of his injury. This evidence could support no other inference. The court fully and carefully reviewed the evidence bearing on this question and completely demonstrated that in speaking of the negligence of the deceased it did not, in any manner, mean contributory negligence (for it had just held that respondent was not negligent) but that it meant what it said, that the death was caused proximately by the sole negligence of the deceased.

In so holding the state court accurately and carefully appraised the evidence and correctly applied to it the rules and principles of law declared in the decisions of this Court and other federal courts. *Southern Railway Co.* v. *Young*

blood, 286 U. S. 313; *Atlantic Coast Line R. Co.* v. *Davis*, 279 U. S. 34; *St. Louis Southwestern R. Co.* v. *Simpson*, 286 U. S. 346; *Brennan* v. *Baltimore & O. R. Co. supra*; *Willis* v. *Penn. R. Co.*, 122 Fed. (2d) 248, 249, 250, certiorari denied, 314 U. S. 684.

In the case last cited it was said:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his own death. In such circumstances his executrix can have no recovery under the Act. Great Northern Ry. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; * * * The recent amendment, 45 USCA, Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

And in *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 69, this court says:

> "It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; * * *"

To the same effect see also *Missouri P. R. Co.* v. *Guy* (1942), 203 Ark. 166, 157 S. W. (2d) 11, certiorari dismissed, 63 S. Ct. 22.

The petitioner's brief lays great stress on the fact that no witness testified expressly that the deceased set the derailer on the rail of the storage track before signalling the engineer to back into that track with the cut of four cars and seems to place great reliance upon this circumstance as affording a basis for more than one inference as to whether the derailer was set by the deceased or by some other member of the train crew. Manifestly, no witness could have seen the deceased set the derailer since the petitioner's own evidence shows it was dark and that there were five members of the train crew, including the deceased, and that, of

the other four members of the crew, the engineer and fireman were more than 37 car-lengths north of the derailer and the conductor and flagman were even further south of it at the time it was set.

Under these circumstances we cannot see any "hazard" to the plaintiff in asking any of the other members of the train crew if Brady reset the derailer, or that defendant "carefully refrained" from asking this question. (Petitioner's Brief, p. 12.) All of the surviving members of the train crew were available to plaintiff and were examined by plaintiff.

The petitioner says that the testimony of Conductor Brandt was "not unequivocal" on the point as to whether he set the derailer. Petitioner's evidence shows that Brandt was far south of it at the time it was set and Brandt testified without contradiction: "When the cars or the train was backed into the pass track to let the northbound train pass, I threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile." (R. 63). Upon examination of Brandt by one of petitioner's counsel, before trial (R. 62), as provided by a state statute, he was asked if someone closed the derailer (R. 62). In view of what Brandt had just sworn as above quoted, petitioner's counsel evidently thought it wise not to ask him who closed it.

This highway crossing was about one-eighth of a mile south of the derailer (R. 22). After protecting the crossing until the train backed south on the main line Brandt went still further south to check 12 cars on the south end of the storage track south of the highway crossing (R. 63).

The uncontradicted testimony of the flagman (R. 85, 86) shows that he got off the train before it started out of the passing track, to flag anything that might be coming from the south, and that he was down there and didn't know anything about what was done when the train came out of the passing track.

The engineer, as a witness for petitioner, testified, without any contradictory evidence, that: "From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. 21).

This evidence conclusively repels the contention of petitioner that after the freight train went north out of the storage track and before backing south on the main line, the conductor or the flagman (petitioner cannot make up her mind which) closed the switch and set the derailer on the storage track. The evidence is conclusive that Brady himself set the derailer on the track.

In an attempt to escape the uncontradicted and conclusive testimony in the trial court, showing that the deceased set the derailer, it is contended in petitioner's brief (pp. 4, 13) that on the movement north out of the pass track the deceased was on one of the four cars just behind the engine. The pages of the record referred to by petitioner (R. 21, 63 and 83) clearly show that the deceased was on the cut of four cars when the train backed south on the main line, after the derailer was set, and was not on the movement north out of the storage track.

In petitioner's brief (pp. 13, 14) reference is made to the testimony of I. M. Scruggs (R. 80), who was not a member of the train crew in this case, in an effort to support the contention that the conductor or flagman reset the derailer when the train came out of the pass track. It will be seen that this witness was speaking of the general practice on a local freight with a crew of six men, including two brakemen (R. 82). There were five members of the train crew in this case and Brady was the only brakeman. The uncontradicted testimony shows that Brady was in charge of the derailer and switch for the movement of the train in and out of the pass track. Petitioner offered no testimony to show that it was the duty of any other member of the train crew to handle the derailer, although she put on the stand Heritage and Holden, both of whom had had ten years experience as brakemen.

It is upon petitioner's unsupported surmise or conjecture, running counter to the record, that some member of the train crew other than her deceased set the derailer, that her counsel base the contention that more than one inference could have been drawn as to whether he was simply guilty of contributory negligence, rather than sole negligence proximately causing his death. "Inference is capable of bridging many gaps. But not in these circumstances, one so wide and deep as this." *Galloway* v. *United States, supra.*

III.

NO QUESTION AS TO THE EFFECT OF THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT UPON ASSUMPTION OF RISK HAS BEEN RAISED BY PETITIONER IN A TIMELY AND ADEQUATE MANNER AND THE DECISION OF THE LOWER COURT WAS NOT BASED UPON ASSUMPTION OF RISK, BUT UPON OTHER DISTINCT GROUNDS ENTIRELY ADEQUATE TO SUPPORT IT.

At no time and in no manner did petitioner, either in the trial court or in the court below, set up or claim any immunity from respondent's defense of assumption of risk either under the Act or under the Amendment of 1939.

As stated by the court below "The case was fought out on grounds selected by the plaintiff." Upon the trial an issue on assumption of risk was submitted to the jury without objection or exception by the petitioner. State rules of practice and procedure govern in an action in the state court under the Federal Employers' Liability Act. *Central Vermont R. Co.* v. *White*, 238 U. S. 507; *Chesapeake & O. R. Co.* v. *De Atley*, 241 U. S. 310; *Fleming* v. *Norfolk Southern R. Co.*, 160 N. C. 196; *Batton* v. *A. C. L. R. Co.*, 212 N. C. 256, certiorari denied, 303 U. S. 651. In the North Carolina courts a party cannot complain of an issue submitted to the jury where he does not except and submit

other issues. *Drennan* v. *Wilkes*, 179 N. C. 512; *Exum* v. *Chase*, 180 N. C. 95.

A thorough search of the record has failed to reveal to us that by the pleadings, evidence, admissions, or in any other manner did the petitioner make any contention in the trial court that the Amendment of 1939 was retroactive so as to eliminate assumption of risk as a defense in the case. On the contrary all of the issues submitted to the jury were fought out on the merits, it being unquestioned that assumption of risk was a defense in a proper case, but it being contended by counsel for petitioner, both in the trial court and in the lower court, only that the deceased had not assumed the risk under the facts of the case.

Petitioner should not now be heard to complain, for the first time, of a ruling of the lower court on a point of which her counsel were fully apprized, but did not contest, either in the trial court or in the court below; the point being that the Amendment does not apply to causes of action accruing prior to its enactment.

Upon the foregoing facts there was no timely raising of a federal question in respect to whether the Amendment was retroactive. *Montana* v. *Rice*, 204 U. S. 291; *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532; *Lynch* v. *New York*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

In respondent's brief on appeal to the Supreme Court of North Carolina it raised, among others, the points (1) that the plaintiff was barred by her intestate's assumption of risk and (2) that the Amendment of 1939 should not be given retroactive effect to eliminate this defense. Counsel for petitioner in their brief on appeal, filed sometime thereafter, naturally combatted the first proposition, but did not take issue in any way with the second proposition to the effect that said Amendment was not retroactive; nor did they so contend in any manner. In short, the petitioner made no contention either in the trial court or in the Supreme Court of North Carolina that the Amendment of

1939 was retroactive and eliminated the defense of assumption of risk from this antecedent cause of action. Therefore *Home Insurance Co.* v. *Dick*, 281 U. S. 397, and *Gant* v. *Oklahoma City*, 289 U. S. 98, relied on by petitioner, have no application, since in both of those cases the question was raised in the state appellate court by the appellant.

The Supreme Court of North Carolina did not pass upon the question of assumption of risk or on the question of whether the Amendment of 1939 to the Federal Employers' Liability Act was retroactive. It said:

> "* * * Hence having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of an injury which was caused by his own act or omission. Southern Ry. Co. v. Youngblood, 286 U. S. 313; Unadilla Valley Ry. v. Caldine, 278 U. S. 139, 73 L. Ed. 224 (note). And his negligence in this respect would be regarded as the sole proximate cause of his injury. Powers v. Sternberg, 213 N. C. 41, 195 S. E. 88; Butner v. Spease, supra; Jeffries v. Powell, 221 N. C. 415. The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here. McCrowell v. R. R. 221 N. C. 366 (377)." (R. 133).

It is our contention that when the court below said that the deceased would be conclusively deemed to have assumed the risk of an injury, it was not using the term "assumed the risk" in the same sense as in the doctrine of "assumption of risk" referred to in the statute and the amendment thereof. *Southern Ry. Co.* v. *Youngblood* and *Unadilla Valley Ry.* v. *Caldine*, cited by the court in support of this statement, do not deal with assumption of risk but only with the negligence of the employee as the sole proximate cause of injury. Furthermore, when the court below said that the Amendment of 1939 to the Federal Employers' Liability Act was inapplicable, it was not holding the Amendment inapplicable because not retroactive; it was merely stating that the Amendment had no place in this case, whether

retroactive or not. This appears to us necessarily so because the court had just held, and throughout its decision held, that the deceased's negligence "would be regarded as the sole proximate cause of his injury."

Moreover, the opinion of the lower court being fully and adequately (and we say solely) based on grounds relating in no way to the doctrine of assumption of risk or to the question of whether the Amendment of 1939 should be retroactively applied, that question is not before this Court.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that judgment as rendered could not have been given without deciding it. *Lynch* v. *New York*, 293 U. S. 52; *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206; *Owens* v. *Union Pacific R. Co. supra.*

The petitioner's brief seeks to construe the opinion of the state court as constituting a ruling as a matter of law that the conduct of the deceased amounted only to contributory negligence which it erroneously labeled sole negligence, constituting conclusive assumption of risk. It is manifest from the opinion of the court that its decision was in no way based upon "assumption of risk" by the deceased of any negligence of the respondent because this phrase was preceded by a distinct ruling of the court that there was no such negligence of the respondent and it was used in connection with the holding of the court that the evidence showed that the death of the deceased was produced solely by his own negligence, and it was his assumption of the risk of his sole negligence of which the court was speaking. The concurring opinion in the *Tiller Case* aptly expresses the sense in which the lower court used the term "assumption of risk" when it said in that opinion: "But neither is the

carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care."

"'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool * * *. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase 'assumption of risk', namely, that a carrier is not liable unless it was negligent." (Ibid.)

It is manifest that when the court below spoke of "assumption of risk" it was using "a hazardous legal tool" in the sense that there can be no recovery for the death of an employee through his sole negligence.

The fact that this migratory and indiscriminate phrase "assumption of risk" was used in the opinion of the court below lends no support to petitioner's contention that it was using this phrase in the sense that it was a defense to negligence of the employer. It is obvious that it was employing the phrase in the sense that petitioner was barred conclusively by the sole negligence of her intestate.

Through sophistry and conjecture, both repelled by the record, petitioner seeks to make respondent the victim of that very tyranny of labels which this Court has just stripped from suits under the Act. The *Tiller Case, supra*, having forbidden one defense from masquerading in the guise of another, lends no support to petitioner's effort to continue this practice by seeking to have this Court say that lack of negligence on the part of respondent, coupled with the death of petitioner's intestate solely through his own

negligence, should be held contributory negligence or assumption of risk.

It is quite plain that in this case the petitioner is earnestly seeking to get a decision of this Court to the effect, as stated in the dissenting opinion in *Bailey* v. *Central Vermont R. Co.*, 87 Law ed. (Adv.) 1030, 1035, "that, as Congress has seen fit not to enact a workmen's compensation law, this Court will strain the law of negligence to accord compensation where the employer is without fault."

IV.

THE AMENDMENT OF 1939 TO THE FEDERAL EMPLOYERS' LIABILITY ACT IS NOT RETROACTIVE AND THEREFORE DOES NOT APPLY TO THIS CASE.

For the reasons and upon the authorities hereinbefore set out we submit that this question is not presented for the consideration of this Court.

However, if the Court goes into the matter respondent contends that the Amendment of August 11, 1939 to the Federal Employers' Liability Act (45 USCA Sec. 54) should not be given retroactive effect to apply to this case.

Plaintiff's intestate died on December 25, 1938 (R. 1). This suit was started on July 26, 1939 (R. 1). The Amendment was approved August 11, 1939.

If counsel for petitioner are correct in the theory on which they contend that the Amendment of 1939 is retroactive, then for many years assumption of risk has been dead but not buried; a corpse, kept in motion by many decisions of this Court, such as *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492. In view of these decisions, construing the Act as worded before the Amendment, we submit that the defense of assumption of risk was alive until that Amendment, and we do not read the opinions in the *Tiller Case* as being obsequies over a defense, long dead, but not until then buried, but rather as holding that Congress put it to death on August 11, 1939.

In the *Tiller Case*, this Court did not overrule previous decisions applying the doctrine of assumption of risk, such as *Toledo, etc., R. Co.* v. *Allen*, 276 U. S. 165. The opinion in the *Tiller Case* pointed out that in the legislative history of the Amendment of August 11, 1939, there was criticism of the doctrine of the *Allen Case*, and this Court held that by the Amendment Congress abolished the doctrine of that case. This clearly implies that Congress recognized that such decisions were the law prior to the Amendment. It took the Amendment to change the law, and it was to change the law, rather than to overrule previous decisions of this Court as erroneous, that Congress passed the Amendment.

When this Court overrules its previous decisions, it does so on the theory that those decisions were wrong under the law when made, and such a holding obviously has a retroactive aspect. But, when Congress, by amendment to the statute, changes the law, it recognizes the law as it existed up until the time of the amendment, but exercises its legislative power to change the law from that time on.

In the *Tiller Case* this Court had no occasion to pass on this question, since the accident involved in that case happened after the date of amendment. In the *Lilly Case* and in the *Owens Case* the Court leaves the question open for future determination. *In every case in which this question has arisen, so far as we can find, it has been decided against petitioner's contention. Wichita Falls & S. R. Co.* v. *Lindley* (Tex. Civ. App. 1940), 143 S. W. (2d) 428; *Guerierro* v. *Reading Co.* (1943, —— Pa. ——), 29 Atl. (2d) 510; *Lilly* v. *Grand Trunk Western R. Co.* (Ill. App.), 37 N. E. (2d) 888; *McCrowell* v. *Southern Ry.*, 221 N. C. 366. And see *Winfree* v. *Northern P. R. Co.*, 227 U. S. 296, in which the Court held that retroactive effect would not be given to the Federal Employers' Liability Act of April 22, 1908, so as to make its provisions applicable to an alleged cause of action for death which accrued before the passage of such statute.

V.

SINCE THE AMENDMENT OF 1939 DOES NOT APPLY TO THIS CASE THE DECISION OF THE COURT BELOW CAN ALSO BE ADEQUATELY SUPPORTED ON THE BASIS OF ASSUMPTION OF RISK BY PETITIONER'S INTESTATE.

Although the court below did not in any manner base its decision upon the defense of assumption of risk, such defense might well have been an additional sound ground for its judgment, since the Amendment of 1939 is not retroactive. Therefore, it is open to respondent to rely on this defense in support of the judgment. *Langnes* v. *Green*, 282 U. S. 531.

The evidence clearly shows that the deceased knew of and accepted the risk in the conditions and situation which brought about his injury and brings this case well within the margin of many decisions of this Court denying recovery under the Federal Employers' Liability Act, by reason of assumption of risk on the part of the employee. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492; *Boldt* v. *Penn. R. R.*, 245 U. S. 441; *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7; *Owens* v. *Union Pacific R. Co., supra.*

CONCLUSION.

It is submitted that the decision below was in harmony with the decisions of this Court; that it was right upon the grounds upon which the court below based it and upon other grounds not passed upon; and that it should be affirmed. This respondent had several strong assignments of error entitling it to a new trial, which were not considered by the Supreme Court of North Carolina, since it disposed of the case on other grounds. *Seago* v. *New York Central R. Co.*, 315 U. S. 781; *Owens* v. *Union Pacific R. Co. supra.* Therefore, in no event, could this Court reverse the decision of the Supreme Court of North Carolina outright

and direct affirmance of the judgment of the trial court in favor of petitioner, as prayed by petitioner.

Respectfully submitted,

SIDNEY S. ALDERMAN,
RUSSELL M. ROBINSON,
Attorneys for Respondent.

S. R. PRINCE,
Washington, D. C.,

H. G. HEDRICK,
Washington, D. C.,

W. T. JOYNER,
Raleigh, N. C.,
Of Counsel.